

Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 13 February 2013

Public Authority: West Lancashire Borough Council
Address: 52 Derby Street
Ormskirk
West Lancashire
L39 2DF

Decision (including any steps ordered)

1. The complainant has requested information relating to a planning application. West Lancashire Borough Council (the "council") provided some information but withheld the remainder under the exceptions for internal communications and personal data. During the Commissioner's investigation the council also applied the exception for adverse effect to the interests of an information provider.
2. The Commissioner's decision is:
 - In relation to the council's application of the exception for internal communications the Commissioner considers that the council has failed to demonstrate that the exception is engaged;
 - In relation to the council's application of the exception for adverse effect to the interests of an information provider, the Commissioner considers that the council failed to show that the exception is engaged;
 - In relation to the council's use of the personal data exception, the Commissioner has found the information does not constitute personal data and that the exception is not engaged.
 - That in handling the request, the council complied with the duty to provide advice and assistance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

- Disclose all the withheld information to the complainant (excluding the names and contact details of council officers and the planning applicant's agent).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 April 2012 the complainant made the following request for information:

"The officers' report for planning application 2012/0185 at last night's planning committee states, at paragraph 6.4 on page 1350:

'...further negotiations have been held between officers and the applicant and his agent resulting in the submission of the current application...'

Will you please supply me with copies of all unpublished written (including typed) material concerning these discussions and any exchanges between officers of the council relating to the matter, right up to and including the draft Borough Planner's report."

6. The council responded on 17 May 2012. It stated that it was refusing to provide the requested information, citing the exemption for information provided in confidence, section 41 of the Freedom of Information Act 2000 (FOIA).
7. Following an internal review the council wrote to the complainant on 15 June 2012, providing the complainant with some information but maintaining its position in relation to the remaining information.
8. Following a second internal review, the council wrote to the complainant on 10 August 2012. It confirmed that the request had been reconsidered under the EIR and that the outstanding requested information was being withheld under the exceptions for internal communications (regulation 12(4)(e)) and personal data (regulation 13).

Scope of the case

9. On 5 September 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. The Commissioner confirmed with the complainant that he would consider whether the council is entitled to rely on the exceptions for internal communications and personal data as a basis for refusing to provide the information you requested.
11. The Commissioner also agreed to consider whether the council provided appropriate advice and assistance and whether it provided an appropriate internal review procedure.
12. During the course of the Commissioner's investigation the council confirmed that it also wished to rely on the exception for adverse effect to the interests of an information provider to withhold all of the requested information.
13. During the course of the Commissioner's investigation the complainant confirmed that they were not interested in being provided with the names or contact details of council officers or of the planning applicant's agent. The Commissioner has, therefore, excluded this information from the scope of the complaint and has not considered it further.
14. In refusing to provide a note of a meeting between a planning officer, applicant and their agent, the council applied the exceptions for internal communications and adverse effect to the interests of the person who provided the information.
15. In refusing to provide a copy of; communications between the planning officer and agent, the pre-planning advice application form, and the agent's letter, the council applied the exceptions for personal data and adverse effect to the interests of the person who provided the information.
16. The extent of the withheld information at paragraph 15 comprises a small amount of correspondence between the council and the applicant's agent and the application for pre-planning advice. The content of the information is a mixture of the administrative and the setting out of the options under consideration.
17. The Commissioner has considered the application of each exception in turn.

Reasons for decision

Regulation 12(4)(e) – internal communications

Note of a meeting between a planning officer, applicant and their agent

18. Regulation 12(4)(e) of the EIR states:

"For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that—

(e) the request involves the disclosure of internal communications."

19. Regulation 12(4)(e) is a class-based exception, meaning there is no need to consider the sensitivity of the information in order to engage the exception. It is only necessary to demonstrate that the information falls within the category defined by the exception

20. However, as with all EIR exceptions, this is a qualified exception. Therefore, even if the exception is engaged, public authorities must go on to apply the public interest test set out in regulation 12(1)(b). A public authority can only withhold the information if the public interest in maintaining the exception outweighs the public interest in disclosing the information.

21. The Commissioner considers that the concept of a communication in this context is broad and will encompass any information someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. An internal communication is also a communication that stays within one public authority.

22. The Commissioner's guidance clarifies that communications can still be considered to be 'internal':

"...even if they record discussions with third parties or contain information received from third parties. For example, a note of a meeting with a third party, created and circulated within a public

authority for its own use, is still an internal communication. It is the form of the communication that is important, rather than its content.”¹

23. The council confirmed that the planning officer created the notes to enable them to refer back to what was discussed when considering the pre application advice.
24. Having considered the council's submissions and the withheld information the Commissioner considers that the meeting note was simply a note made by the planning officer for their own personal referral. As the council has not confirmed that the note was circulated more widely or placed on file for others to consult the Commissioner has concluded that it does not constitute an internal communication and that the information does not, therefore, engage the exception.
25. As he has concluded that the exception is not engaged the Commissioner has not gone on to consider the public interest test.

Regulation 12(5)(f) – interests of the person providing information

The note of the meeting, communications between the planning officer and agent, the application form and the agent's letter

26. Regulation 12(5)(f) allows that information will be excepted information where disclosure would adversely affect the interests of an information provider. The exception covers the interests of a person who:
 - supplied information voluntarily,
 - did not supply it in circumstances such that that or any other public authority is entitled apart from the EIR to disclose it; and
 - has not consented to disclosure of the information supplied.
27. In its submissions to the Commissioner the council simply stated that it was satisfied that that all the withheld information satisfied that 3 criteria listed above.
28. However, having had regard for the council's submissions in relation to the exception for personal data (see below), the Commissioner considers that the council has shown that the initial 3 conditions of the exception have been met.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/eir_internal_communications.pdf

supplied information voluntarily

29. The preplanning advice service is something that planning applicants choose to do. There is no legal requirement for such submissions to be made so the information was, therefore, provided voluntarily.

...did not supply it in circumstances such that that or any other public authority is entitled apart from the EIR to disclose it

30. The Commissioner has not been presented with arguments that suggest that the council is entitled to disclose the information apart from in response to an EIR request.

has not consented to disclosure of the information supplied.

31. As noted in his consideration of the council's application of the exception for personal data below, the Commissioner has concluded that the person supplying the information has not consented to its disclosure.

Adverse effect to the interests of the person providing the information

32. In his consideration of regulation 13 below, the Commissioner notes that the planning application to which the information relates had already been approved by the date of the request and the information is akin to that usually made available via the planning application process. He, therefore, does not consider that it is obvious that disclosure would result in any adverse effect to the interests of the information provider.
33. In the absence of any arguments from the council which explain why disclosure of the information would adversely affect the interests of an information provider, the Commissioner has concluded that council has not demonstrated that the information falls within the scope of the exception. As he has found that the exception is not engaged he has not gone on to consider the public interest test.

Regulation 13 – personal data

Communications (email and written) between the planning officer and agent, the application form and the agent's letter

34. Regulation 13 of the EIR provides that a public authority shall not disclose information which is the personal data of a third party where its disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
35. In order to rely on regulation 13, the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"personal data means data which relate to a living individual who can be identified-

(a) from those data,

(b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."

36. The two main elements of personal data are that the information must "relate to" a living person, and that person must be identifiable. Information will "relate to" a person if it is about them, linked to them, has some biographical significance for them, has them as its main focus or impacts on them in any way.
37. The council has argued that the information constitutes the personal data of the planning applicant. Having viewed the withheld information the Commissioner notes that the planning applicant in this case is a limited company. The focus of this correspondence and the other information which has been withheld by the council under regulation 13 is, therefore, the business interests of a limited company², rather than a living individual and the Commissioner does not consider that the information constitutes their personal data.
38. As the Commissioner has found that the information does not constitute personal data he has concluded that the council has wrongly applied regulation 13.

Procedural Matters

Regulation 9 – advice and assistance

39. Regulation 9(1) of the EIR states:

"A public authority shall provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to applicants and prospective applicants."

40. Regulation 9 (3) of the EIR states:
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² The applicant's website clearly designates J Mallinson (Ormskirk) Ltd as a limited company: <http://www.j-mallinson.co.uk/>

"Where a code of practice has been made under regulation 16, and to the extent that a public authority conforms to that code in relation to the provision of advice and assistance in a particular case, it shall be taken to have complied with paragraph (1) in relation to that case."

41. The code of practice issued under regulation 16 of the EIR (the "EIR code") sets out examples of steps which authorities might take in providing requesters with advice and assistance³.
42. The EIR code advises that the list of recommendations it provides should not be considered exhaustive and that authorities should be ready to provide such advice and assistance to requesters "so far as it would be reasonable to expect it to do so", as required by regulation 9(1). However, the Commissioner considers that the nature of advice and assistance suggested by the EIR code falls into 3 broad categories: assisting potential requesters in submitting their requests; helping applicants to better describe the information they are seeking (clarification) and assisting requesters who have requested information in a specific form and format (relating to the application of regulation 6).
43. In this case, the complainant considers that, in its handling of their request, the council failed to provide them with any advice and assistance. The complainant has not specified what form of advice and assistance the council might have reasonably provided in handling their request.
44. Having looked at the council's handling of the request, the Commissioner does not consider that the request triggers any of the broad classes of advice and assistance identified above. As it is also unclear what further steps the council might have taken, beyond the explicit recommendations of the EIR code, in handling the request, the Commissioner finds that council complied with regulation 9(1).

Other matters

45. Although they do not form part of this decision notice, the Commissioner would like to note the following matters of concern.
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³ The EIR code is published here:

http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

Number of stages in internal review procedure

46. Under regulation 11 of the EIR, public authorities have a duty to deal with complaints submitted by requesters about their handling of requests for information. Under regulation 11(4), complaints or 'internal reviews' should be processed as soon as possible and within 40 working days of the date of their receipt.
47. Paragraph 61 of the EIR recommends that internal review procedures should be "...clear and not unnecessarily bureaucratic. They should be capable of producing a prompt determination of the complaint."⁴
48. The Commissioner's guidance, which is based upon the EIR code's recommendations advises that internal review procedures "...should be a clear and straightforward, single stage process."⁵
49. In this case, the Commissioner notes that the council directed the complainant through a 2-stage internal review process. As he considers that, for the reasons stated above, this is unlikely to conform to the EIR code, he recommends that, in future, the council uses a single-stage internal review procedure.

Content of internal review

50. In relation to internal reviews, paragraph 61 of the EIR code states:

*"The complaints procedure should be a fair and impartial means of dealing with handling problems and reviewing decisions taken pursuant to the EIR....It should be possible to reverse or otherwise amend decisions previously taken."*⁶

51. In this case the council's internal review determined that the request had been wrongly handled under the FOIA, amended its position and dealt with the request under the EIR.
52. Although the complainant has raised concerns that, in this case, the council revised its stance during its handling of the request, the Commissioner considers that this is a valid possible outcome of the

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http://www.ico.gov.uk/upload/documents/library/environmental_info_reg/detailed_specialist_guides/environmental_information_regulations_code_of_practice.pdf

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Detailed_specialist_guides/internal_reviews_under_the_eir.ashx

⁶ Ibid.

internal review process. He has concluded that it is, therefore, likely that the council's internal review conformed to the recommendation contained in paragraph 61 of the EIR code.

Right of appeal

53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Lisa Adshead
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